Supreme Court, U.S.
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No. 09-1387

IN THE SUPREME COURT OF THE UNITED STATES

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.,

Petitioner,

v.

PERRYMAN CONSULTANTS, INC., M. RAY PERRYMAN, XYZ INSURANCE COMPANY, TUV INSURANCE COMPANY, JAZZ ENTERPRISES, INC., STEVE URIE, MARK BRADLEY, PAULA BRADLEY, RONALD JOHNSON, LODGING SYSTEMS, INC., CATFISH QUEEN PARTNERSHIP IN COMMENDAM, ARGOSY OF LOUISIANA, INC., and ARGOSY GAMING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

LAW OFFICES OF
CHARLES S. LAMBERT, JR., LLC

CHARLES S. LAMBERT, JR.
Counsel of Record
10537 Kentshire Court, Suite A
Baton Rouge, Louisiana 70810
Telephone: (225) 405-0660
Email address: chip@grandlawfirm.com
Attorney for Petitioner,
Capitol House Preservation Company, LLC

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REPLY BRIEF

I. QUESTIONS PRESENTED

Respondents gravely mischaracterize the nature of this case asserting this case concerns "alleged" misrepresentations made in an administrative proceeding. Opp.1. To the contrary, the undisturbed findings of the jury were that Respondents "knowingly and intentionally made materially false, untrue and/or misleading representations in their application for a license" ("License") submitted to the Louisiana Gaming Division, these misrepresentations violated the Louisiana Riverboat Act, the Gaming Division would have denied Respondents' License application, and Petitioner would have been awarded that License. A-51 to A-53. Although the state intermediate appellate court found the *Noerr-Pennington* doctrine immunized Respondents' actions from liability, the lower court recognized that Respondents did indeed make misrepresentations and/or omissions to the Gaming Division in its adjudicatory process. A-38 to A-39.

II. THE DECISION BELOW CONFLICTS WITH SEVERAL DECISIONS OF THIS COURT AND NUMEROUS FEDERAL COURTS AS THE *NOERR-PENNINGTON* DOCTRINE DOES NOT IMMUNIZE MISREPRESENTATIONS MADE IN AN ADJUDICATORY PROCESS

Respondents claim "the holding below is wholly consistent with this Court's decisions, which have never recognized an exception for *Noerr-Pennington* immunity of the sort advanced by petitioner." Opp.14. To the contrary, the lower court's holding conflicts directly with this Court's decisions of *California Motor Transport*, *Allied Tube*, and *BE&K*.

It is undisputed that Respondents made misrepresentations in the adjudicatory process of the Gaming Division. The jury found that Respondents intentionally made materially false, untrue and/or misleading representations in their License application in violation of the Riverboat Act and the Louisiana Unfair Trade Practices and Consumer Protection Law ("LUTPL"). A-51 to A-52.

The lower court's decision conflicts with the seminal case of *California Motor Transport*, where this Court clearly declared: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process". *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). Again in *Allied Tube*, this Court recognized that "unethical and deceptive practices

can constitute abuses of administrative or judicial processes that may result in antitrust violations" outside *Noerr* protection. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988). Therefore, the lower court improperly immunized Respondents' misrepresentations in conflict with *Allied Tube*.

Although Respondents cite *Allied Tube* for the proposition that this Court has "noted that a legislatively created board weighing a discretionary decision does not function in an adjudicatory manner. *See* 486 U.S. at 504" (Opp.19), *Allied Tube* made no such holding.

In *Allied Tube*, this Court rejected the "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action". *Id.*, 486 U.S. at 503. Thus, this Court has noted different standards apply to misrepresentations made in administrative or adjudicatory processes as compared to political settings. However, in *PRE* this Court declined to address the issue raised here: "to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations" made in an administrative or judicial process. *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, 61, n.6 (1993). This Court should grant this Petition to do so.

Respondents discount *California Motor Transport* and *Allied Tube*, asserting this Court's

decisions pre-date *PRE*. Opp.16, FN10. Yet, *PRE* defined the test for the sham litigation exception to the *Noerr-Pennington* doctrine, which is not at issue here; thus, *PRE* is not controlling.

Respondents also claim that *BE&K* "adds nothing to petitioner's case". Opp.20. This Court again emphasized in *BE&K* (nine years after *PRE*) that the *Noerr-Pennington* doctrine did not extend to "illegal and reprehensible practice[s] which may corrupt the ... judicial proces[s]," *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 525 (2002). Accordingly, the lower court improperly extended the *Noerr-Pennington* doctrine to protect Respondents' misrepresentations and illegal activity committed in an adjudicatory process--conduct well beyond the limits consistently identified by this Court over the last four decades in *California Motor Transport*, *Allied Tube*, and *BE&K*.

Respondents claim that Petitioner has not identified "a single decision that is in conflict with the ruling in this case." Opp.1-2. To the contrary, Petitioner identified many cases that recognize that the knowing submission of false facts to an administrative or adjudicatory body is not protected under the *Noerr-Pennington* doctrine; Petitioner also listed a few articles by legal commentators that discuss the misrepresentation exception caselaw in detail, which show the lower court's ruling was in error. Pet. 32-33. Further, the Federal Trade Commission ("FTC") issued a report in 2006 entitled "Enforcement Perspectives on the *Noerr-Pennington* Doctrine" ("FTC Report"), which observed the weight

of the caselaw has recognized a misrepresentation exception to the *Noerr-Pennington* doctrine, including nine federal circuit courts. *See* FTC Report, particularly 22-28, *e.g. Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) ("There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body. The first amendment has not been interpreted to preclude liability for false statements."); *see also Whelan v. Abell*, 48 F.3d 1247, 1254-55 (D.C. Cir. 1995) ("We see no reason to believe that the right to petition includes a right to file deliberately false complaints.").

However, the lower courts have applied the misrepresentation exception in varying situations and under differing standards. *Id.* The FTC recognized there is an absence of guidance from this Court if and when the *Noerr-Pennington* doctrine protects deliberate and material misrepresentations in non-political contexts, stating:

> Equally clearly, the doctrine recognizes that not all activities directed at government are genuine attempts to request a sovereign government action. What is not clear, however, are the exact boundaries of *Noerr*'s protection for such activities, and neither the Supreme Court case law nor federal appellate decisions provide a firm guide.

FTC Report, 16. Accordingly, this Court should answer the question left open in *PRE* to articulate when the misrepresentation exception applies to the *Noerr-Pennington* doctrine.

The lower court based its application of the *Noerr-Pennington* doctrine on the finding that Petitioner failed to meet "its burden of showing that the defendants' acts rose to the level of criminality to satisfy the standard set forth by the court in *Astoria*." A-38. *Astoria* made no such holding. In *Astoria Entertainment, Inc. v. DeBartolo,* 12 So.3d 956 (La. 2009), the Louisiana supreme court recently found "no reason to give the defendants' illegal actions First Amendment constitutional protection" and held the *Noerr-Pennington* doctrine "should not be expanded to protect illegal activity, especially in claims that arise outside of the scope of antitrust laws." *Astoria*, 12 So.3d at 967. The *Noerr-Pennington* doctrine does not protect illegal actions, which the jury found here; therefore, the lower court wrongly held that only a showing of criminality will vitiate the *Noerr-Pennington* doctrine.

This inconsistent application of the *Noerr-Pennington* doctrine by the Louisiana courts highlights the need for this Court to clarify if and when *Noerr-Pennington* immunizes misrepresentations made in an adjudicatory or administrative proceeding. Importantly, *Astoria* noted:

> while the [Supreme] Court, in dicta, has discussed *Noerr-Pennington*

> immunity relative to illegal actions in several cases, we find no guidance in the Court's statements.

Astoria, 12 So.3d at 965. This Court should grant this Petition to provide this missing guidance to the courts—an issue that has sweeping importance and has divided or confused other courts.

III. RESPONDENTS' VIOLATIONS OF VALID STATUTES ARE NOT ENTITLED TO PROTECTION UNDER THE *NOERR-PENNINGTON* DOCTRINE

The lower court applied the *Noerr-Pennington* doctrine based on the finding that Respondents' misrepresentations "did not subvert the Division's decision-making process to the extent that the Division could not effectively evaluate the three proposed projects". A-37. Not only was the conclusion incorrect, but the lower court applied the wrong standard. Conduct that violates a valid statue or achieves an illegal result is not protected by the First Amendment under *California Motor Transport*, where this Court stated:

> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.

404 U.S. at 513-514. In addition, this Court held in *California Motor Transport* that *Noerr-Pennington*

immunity is not available when "the administrative and judicial processes have been abused" when "those processes produced an illegal result" [404 U.S. at 513] or "[i]f the end result is unlawful, it matters not that the means used in violation may be lawful" [404 U.S. at 515]. These conditions are met here to preclude the application of the *Noerr-Pennington* doctrine.

The jury found Respondents violated valid statutes of the Riverboat Act and the LUTPL by their intentional submission of misrepresentations and/or omission of material facts. A-51 to A-52. Therefore, Respondents' conduct is not protected under the First Amendment or the *Noerr-Pennington* doctrine.

Moreover, the Gaming Division's License process was deprived of its legitimacy. La. R.S. 27:76(A)(2) and of the Riverboat Act mandates the disqualification of an applicant that submits material misrepresentations and omissions in a License application. A-67. Contrary to Respondents' claim at Opp.3, their material misrepresentations could not be corrected by amendment. There is no discretion. *Lambert v. Riverboat Gaming Enforcement Div.*, 96-1856, p.9 (La.App. 1 Cir. 12/29/97) 706 So.2d 172, 177. Thus, the jury properly found that the License should not have been issued to Respondents. A-52.

Respondents' misrepresentations and unlawful acts abused the Gaming Division's License process because it produced an "illegal result"--

Respondents violated the Riverboat Act but obtained a License. Under *California Motor Transport*, the lower court improperly extended the *Noerr-Pennington* doctrine to immunize the Respondents' illegal acts.

IV. *ARMSTRONG* INVOLVES POLITICAL ACTIVITY NOT PRESENT HERE AND IS NOT CONTROLLING

Armstrong does not parallel "this case in nearly all respects" as Respondents incorrectly assert. Opp.22. *Armstrong* is easily distinguishable from this case because *Armstrong* involved policy considerations not present here and, further, is in conflict with several other courts that dealt with the same issue.

The plaintiff in *Armstrong* contended the defendant and its physicians conspired to prevent it from establishing a new surgery center. Under the Pennsylvania law, anyone proposing to establish a new health care facility must first obtain a Certificate of Need ("CON") from Pennsylvania's Department of Health. *Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hosp.*, 185 F.3d 154, 156 (3d Cir. 1999). The Department reviewed CON applications and made a determination on the adequacy of existing health care providers and the need for additional facilities. *Id.* In *Armstrong*, plaintiff petitioned for an increase in the number of hospitals in a particular market from one to two.

In a 2-1 decision, the *Armstrong* majority held:

> The risk that the plaintiff's injury is not the result of a bona fide execution of state policy is far less substantial here than in *Omni* and there is, accordingly, far less justification for federal court review of the state's policy judgment.

Armstrong, 185 F.3d at 164. The *Armstrong* majority found the policy judgments made by the agency to deny the CON afforded protection to the defendants under the *Noerr-Pennington* doctrine. *Id.*

Neither Petitioner nor Respondents asked the Division to increase the number of licenses authorized under the Riverboat Act (nor was the Division empowered to make such a legislative decision). Petitioner and Respondents simply asked the Gaming Division to approve their respective applications under the existing standards set forth by the Louisiana legislature in the Riverboat Act. *Armstrong* involved policy judgments, *i.e.* political activity, not present here. Therefore, *Armstrong* is not controlling or instructive to the present case.

Respondents improperly characterize the Division as a policy making agency. Opp.17. The Gaming Division rendered an adjudication under La. R.S. 27:73(A) to determine whether the License applicants met the requirements of the Riverboat Act. A-66. In reaching its decision, the Gaming Division followed the policies already promulgated by

the Legislature in the Riverboat Act. Even the lower court acknowledged that Respondents were not engaged in petitioning activity in the sense of *Noerr*:

> [t]he alleged material misrepresentations [of Respondents] in the underlying case were not designed to influence policy but rather to purportedly undermine the means of effectuating that policy.

A-26. Nevertheless, the lower court improperly applied the *Noerr-Pennington* doctrine to immunize Respondents' misrepresentations made in an adjudicatory setting.

Armstrong is distinguishable for another reason; the majority based its decision on the following finding:

> the state decision makers were disinterested, conducted their own investigation, and afforded all interested parties an opportunity to set the record straight.

Armstrong, 185 F.3d at 163. This critical factor is missing here. In the present case, the Louisiana supreme court found the License hearings were between each separate applicant and the Gaming Division, not between one applicant and another (*i.e.*, Petitioner was not a party to Respondents' License hearing) and, further, found due process considerations precluded the lower court from

applying the Gaming Division's findings to any of the issues raised against Respondents in this civil action. *Capitol House Preservation Co., L.L.C. v. Perryman Consultants, Inc., 05-0090, 05-0091* (La. 3/24/05) 897 So. 2d 584, adopting the dissent set forth below at 03-1983, 03-1984 (La. App. 1st Cir. 11/3/04), 889 So.2d 304, 311-312. Unlike *Armstrong*, there was no opportunity for Petitioner "to set the record straight" in Respondent's License hearing. *Armstrong* is inapposite.

Moreover, *Armstrong* contains a robust dissent, based in part on *Armstrong's* conflict with the Third Circuit's own ruling issued in *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999). *Armstrong*, 185 F.3d at 164. The majority in *Armstrong* also admitted its result "conflicted" with the holdings of other circuits, including *St. Joseph's Hospital v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986), *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998) and *Potters Medical Center v. City Hospital Ass'n.*, 800 F.2d 568 (6th Cir. 1986). *Id.*, at FN7.

In *St. Joseph's Hospital*, the court found a misrepresentation to a state health planning agency to be entirely beyond *Noerr-Pennington* coverage, finding:

> When a governmental agency such as [the State Health Planning Agency] is passing on specific certificate applications it is acting judicially. Misrepresentations under these

> circumstances do not enjoy *Noerr* immunity.

795 F.2d at 955. Likewise, the Gaming Division was acting judicially in the License approval process; thus, Respondents' misrepresentations were not entitled to protection under the *Noerr-Pennington* doctrine. The dissent in *Armstrong* also listed numerous other cases that reached different results than the majority opinion. *Armstrong* dissent, 185 F.3d at 168. *Armstrong* is far from the definitive authority Respondents portray it to be and is, quite frankly, wrong as a matter of law.

The *Armstrong* majority improperly relied upon *Omni* to reach its decision. *Omni* concerned lobbying activity, where the *Noerr-Pennington* doctrine is given a wide berth. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 381-382 (1991). Thus, *Armstrong* and its reliance on *Omni* is not persuasive here because the setting is an adjudicatory arena, not a lobbying or legislative one.

Respondents cite to *Unocal* in support of the lower court's decision (Opp.20-21, FN12); yet, the FTC ruled in *Unocal* that deliberate misrepresentations outside of the political context that undermine the legitimacy of government proceedings should not be entitled to the protection of the *Noerr-Pennington* doctrine. *In the Matter of Union Oil Co. of California*, FTC Docket No. 9305, 2004 WL 1632816 *30 (F.T.C. 2004). Respondents' deliberate misrepresentations undermined the

legitimacy of the Gaming Division's License process because Respondents violated the Riverboat Act but still obtained a License. Further, Respondents' lengthy discussion of the briefs filed in *Armstrong* (Opp.25-28) is not persuasive as those briefs pre-date the different conclusions made in *Unocal* and the FTC Report of 2006.

V. JURISDICTION LIES UNDER 28 U.S.C. §1257(a)

28 U.S.C. §1257(a) provides this Court may review cases from the highest court of a state, in which review may be had where any title, right, privilege or immunity is specially claimed under the Constitution of the United States. Although Petitioner brought this action against Respondents under state law, Respondents raised a federal issue by asserting the non-statutory affirmative defense of the *Noerr-Pennington* doctrine, which was created by this Court and is fundamentally grounded in First Amendment principles. By asserting this defense, Respondents necessarily claim immunity from liability based on acts they assert are protected by the Constitution of the United States.

The lower court found "the *Noerr-Pennington* immunity doctrine affords [Respondents] immunity from liability". A-38. The lower court's decision rests on its misapplication of this immunity doctrine grounded on the First Amendment and jurisdiction clearly lies with this Court under §1257(a).

In *Michigan v. Long*, 463 U.S. 1032, 1040 (1983), the case offered by Respondents is illustrative of an appropriate finding of jurisdiction, where this Court held:

> when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Just as the lower court in *Michigan v. Long* relied exclusively on its understanding of the *Terry* doctrine developed by this Court, the lower court rendered its decision in this case based exclusively on its misapplication of the *Noerr-Pennington* doctrine created by this Court. Consequently, this Court has jurisdiction to review this important federal question regarding the application of the *Noerr-Pennington* doctrine.

VI. THE APPLICATION OF *NOERR-PENNINGTON* IS A PURE LEGAL QUESTION

As the lower court properly stated, the application of the *Noerr-Pennington* doctrine is a question of law. A-27. Yet, Respondents improperly

rely on Gaming Division's findings from the hearing on Respondents' License application (to which Petitioner was not a party). Notwithstanding, the Gaming Division found Petitioner "met the qualifications requirements contained in the Riverboat Act." Opp. App.32. Respondent's spin on the facts is irrelevant to this Court's consideration of whether to grant this Petition, which is based on the following legal question:

> Are Respondents' illegal acts and deliberate misrepresentations in an adjudicatory process immunized under the *Noerr-Pennington* doctrine based on First Amendment principles?

The answer to this federal question is emphatically no.

Respectfully Submitted,

LAW OFFICES OF
CHARLES S. LAMBERT, JR., LLC

CHARLES S. LAMBERT, JR.
Counsel of Record
10537 Kentshire Court, Suite A
Baton Rouge, Louisiana 70810
Telephone: (225) 405-0660
Email address: chip@grandlawfirm.com
Attorney for Petitioner, Capitol House Preservation Company, LLC

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